

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Review of the Commission's)
Regulations Governing)
Television Broadcasting)

MM Docket 91-221

To: The Commission

REQUEST FOR PROMPT RESOLUTION
OF RULEMAKING PROCEEDING
OF BENEDEK BROADCASTING CORPORATION,
CHRONICLE BROADCASTING COMPANY,
LIN BROADCASTING CORPORATION,
MIDWEST TELEVISION, INC.,
PADUCAH NEWSPAPERS, INC.,
POST-NEWSWEEK STATIONS, INC.,
PROVIDENCE JOURNAL COMPANY, AND
THE SPARTAN RADIOCASTING COMPANY

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SUMMARY

The Commission's duopoly rule unfairly and illogically hinders television broadcasters from competing effectively in the multichannel marketplace. Recognizing the need to revamp a regulatory structure that was created for another age, the Commission initiated rulemaking proceedings in the spring of 1992. Recent technological and economic developments make the need for regulatory reform both more urgent and more feasible now than ever. The nearly two year old rulemaking proceeding should be concluded and the duopoly rule relaxed without further delay.

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THE SPARTAN RADIOCASTING COMPANY**

Benedek Broadcasting Corporation, Chronicle Broadcasting Company, LIN Broadcasting Corporation, Midwest Television, Inc., Paducah Newspapers, Inc., Post-Newsweek Stations, Inc., Providence Journal Company, and The Spartan Radiocasting Company are licensees of 45 television stations (collectively, "Licensees"). Most Licensees submitted comments on the Commission's Notice of Proposed Rulemaking ("NPRM")^{1/} on August 24, 1992, welcoming the Commission's proposed expedited regulatory reform and urging it to alter

^{1/} Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rule Making, 7 F.C.C. Rcd. 4111 (1992). Although the NPRM addressed other multiple ownership restrictions, Licensees here focus on the duopoly rule alone.

the duopoly rule^{2/} to permit (1) common ownership where neither station actually serves the same market and (2) VHF-UHF and UHF-UHF combinations in the same market.

Other comments evinced virtually no opposition to moving from a Grade B to Grade A contour standard and many supported further relaxation of the duopoly rule and other ownership restrictions.

Today, over 21 months after the Commission adopted its NPRM and exactly 17 months after the deadline for reply comments passed, Licensees request prompt resolution of the rulemaking proceeding.^{3/} The Commission, by initiating this proceeding, recognized that fundamental changes in the video marketplace required new thinking on ownership limitations.^{4/} The duopoly rule, a relic of television's early days, no longer furthers, and even frustrates, the goals of diverse media control and programming by crippling broadcasters in the

^{2/} Section 73.3555(b), as amended, of the Commission's Rules provides:

No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station . . . and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.

^{3/} To the extent that Section 1.415(d) of the Commission's Rules applies, Licensees hereby request leave to file this submission.

^{4/} See, e.g., NPRM; F. Seltzer, J. Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper Series No. 26, 6 F.C.C. Rcd. 3996 (1991) ("Multichannel Marketplace").

contest of the marketplace. The rapid increase in the number of participants in the video market since September 1992 makes relaxation of the ownership restrictions more feasible and more crucial than ever for the vitality of the broadcasting industry and the public interest it serves.

I. THE DUOPOLY RULE IS ILLOGICAL AND UNFAIR.

The Commission adopted the Grade B contour duopoly rule to foster diversity and competition in a young, sparsely populated television industry. The prohibition against owning more than one television station per market flowed from the assumptions that (1) "stations owned by different people will [more likely] compete with each other, for the same audience and advertisers, than stations under the control of a single person or group[;]" and (2) "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.'"^{5/}

As Licensees commented in 1992, the proliferation of broadcasting and cable channels has invalidated the assumptions on which the duopoly rule is based. It was once thought that broadcast stations could flourish in spite of the

^{5/} Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcasting Stations, Report and Order ("Report and Order"), 45 F.C.C.2d 1476, 1477, on recon., 3 R.R.2d 1554 (1964) (footnotes omitted).

rigid requirement of separate ownership. But television station revenue and audience shares have declined over the past two decades and are expected to fall further as viewing of other video outlets increases.^{5/} Competition is driving out some local stations altogether. As weaker stations go dark, diversity and localism suffer.^{2/} A relaxation of ownership restrictions could save some of these stations by permitting them, like their cable competitors, to exploit the efficiency benefits of combined operation.

The duopoly rule was thought necessary to foster head-to-head competition among channels for the same audience and advertisers. Whatever the value of such direct competition, it no longer exists, even in stations' core service areas. Different channels, particularly on cable, target different shares of an audience fragmented over 30 to 100 or more channels, with more on the way. Control over multiple channels, rather than stunting competition, has allowed cable to diversify into niche services that would not otherwise be economically feasible. Broadcasters too, if enabled to merge overlapping functions and personnel, could plow the savings into more diverse programming. For example, a broadcaster might program a network-affiliated station and

^{5/} See Multichannel Marketplace, 6 F.C.C. Rcd. at 4000, 4031.

^{2/} The Commission's authors recognized that "[i]n smaller markets the effect [of economic decline] will be more severe with some stations going off the air, reducing viewer choice." Multichannel Marketplace at 4001.

provide a local all-news channel on a struggling UHF station currently unable to provide local coverage at all. As the industry matures, efficient consolidation promises more diversity by increasing competition between broadcast stations and cable systems and enhanced diversity among universally available broadcast signals.

It was once thought that the Grade B contour standard was necessary to achieve the Commission's goals. A less restrictive alternative is now clearly superior. Even in 1964, the Commission recognized that a Grade A overlap standard might better reflect the actual service area of most broadcast stations but it adopted the Grade B standard instead because Grade B signals provided the only video service in some parts of the country.^{8/} This is not true today and can no longer justify the overbroad benchmark.

In case after case where the Commission has granted waivers of the duopoly rule, it has recognized that, for example, New York and Philadelphia, Buffalo and Rochester, and Spartanburg and Augusta, are in fact separate markets. But this observation applies to all markets whose television stations do not have overlapping Grade A contours. That reasoning alone calls for liberalization of the benchmark to the more realistic Grade A standard. By turning to a duopoly standard pegged more rationally to the geographic area in which most of a station's actual audience lives, the

^{8/} See Report & Order, 45 F.C.C.2d at 1484.

Commission would permit stations and the public to benefit from economies of scale without sacrificing any of the advantages of competition.

By the same token, a hard look at the market for UHF stations reveals that old prejudices against certain consolidations do not reflect market realities. The number of UHF stations mushroomed 150% between 1980 and 1990, primarily due to the growth of cable.^{2/} Unfortunately, in many instances, local markets cannot sustain the surge and the weaker UHF stations fall. The surest way to preserve as many UHF stations, and as much programming variety, as possible is to allow UHF stations to combine operations with each other and with VHF stations in the same market.

**II. THE DUOPOLY RULE INCREASINGLY
HANDICAPS BROADCASTERS IN COMPETITION
WITH NEW ALLIANCES AND TECHNOLOGIES.**

Since Licensees submitted their September 1992 comments to the NPRM, continuing changes in video services have made their position more urgent. Recently announced telephone and cable company alliances and new technological developments in cable, wireless, satellite, and broadcasting transmission have obliterated the last vestiges of the infant television industry for which the duopoly rule was crafted. The inequity resulting from outdated ownership restrictions imposed on broadcasters in a 30 to 100 channel environment was

^{2/} See, Multichannel Marketplace, 6 F.C.C. Rcd. at 4111-4012.

clear enough in 1992; the predicted arrival of more channel systems to many markets in 1994^{10/} magnifies that inequity and requires swift action.

In 1993, major cable companies proposed to increase their market power by combining with telephone companies to build advanced fiber optic systems.^{11/} For example, US West and Time Warner agreed in May 1993 to spend \$5 billion over five years to create full service networks capable of providing video telephony and a wide range of other services.^{12/} Bell South bought a substantial interest in Prime Management Co. in October 1993^{13/} and Southwestern Bell announced plans to acquire a 40% interest in Cox Cable for \$1.6 billion in December 1993.^{14/}

In addition, the first two direct-to-home broadcast satellite services, USSB and GM/Hughes' DirecTV, will begin operations in April 1994, with the capability of serving the

^{10/} Market tests are announced almost daily. See, e.g., "TCI Will Test 120 Channels in Illinois," Multichannel News, January 31, 1994 at 1.

^{11/} Although it has been announced that the planned \$30 billion merger between Bell Atlantic and Tele-Communications Inc. will not occur, the trend toward consolidation is nevertheless strong and inevitable.

^{12/} Edmund L. Andrews, "From Sibling Rivalry to Civil War," New York Times, November 28, 1993, at A1, A6.

^{13/} "Bell Atlantic, TCI Forge Cable Giant Likely to Shape Interactive World," Information Networks, October 18, 1993.

^{14/} Paul Farhi and Sandra Sugawara, "Southwestern Bell, Cox Plan Cable Partnership," Washington Post, December 8, 1993, at F1, F4.

entire nation. DirectTV, for example, expects to offer 23 cable network channels as well as 50-60 channels of pay-per-view movies and 30 channels of pay-per-view sports and special events in its first package, followed by a second package of even more options.^{15/} Five of the biggest cable companies recently formed a joint venture to establish areawide video telephony and other services through spectrum in the 28 GHz band.^{16/} Finally, the FCC has allocated spectrum for multipoint distribution services.^{17/} It is expected that wireless cable will be available in 23 of the top 25 television markets by the end of the year.^{18/}

The current duopoly rule was adopted at a time when a few stations commanded the air and cable television existed only to retransmit broadcast signals in rural fill-in areas. Then, the single broadcast station appeared to some as a giant the FCC needed to restrain. By the end of 1992, it was clear that the power of the individual station was much diminished. More than 54 percent of all American households had access to 10 or more over-the-air broadcast signals as compared with

^{15/} "DBS Ventures Fill In The Cracks With First Program Packages," Video Services News, February 21, 1994; "Prices For DBS Programming Launched," Broadcasting & Cable, January 3, 1994, at 47; "PPV, DBS Style," Broadcasting & Cable, November 29, 1993, at 60.

^{16/} "5 Big MSO's Form Joint Venture to Compete With Telcos," Communications Daily, December 2, 1993, at 1-2.

^{17/} See 47 C.F.R. §§ 21.900-21.914 (1992); 47 C.F.R. §§ 74.901-74.992 (1992).

^{18/} Communications Daily, February 16, 1994 at 8.

four percent in 1964,^{19/} and cable had introduced on average another 20 channels of programming to 60 percent of American households.^{20/} Today, cable passes over 90 percent of the country's households, the number of cable channels has exploded, and over-the-air broadcast offerings are or shortly will be multiplying as a result of digital compression^{21/} and programming networks.^{22/} The array of viewing options now dwarfs the single broadcast station. Far from dominating other voices if freed from the Grade B contour rule, a station would still exert only a fraction of the influence it did in the rule's earlier days.

III. THE DUOPOLY RULE HINDERS BROADCASTERS AND THE PUBLIC FROM REALIZING THE MEDIUM'S POTENTIAL.

One of the most elusive and highly prized goals of the National Information Infrastructure ["NII"] is universal access to advanced telecommunications. Broadcast television is still the only industry to provide free and universal

^{19/} See NPRM, 7 F.C.C. Rcd. at 4114.

^{20/} See Multichannel Marketplace, 6 F.C.C. Rcd. at 4008 & Table 1.

^{21/} See, e.g., announcement by Fox Broadcasting Co. that it is developing a plan to offer multiple programming services through digital compression over the air. Kim Mitchell, "Fox Wants Additional Channels Without Cable," Multichannel News, February 7, 1994 at 42.

^{22/} See, e.g., announcement by Warner Brothers and Paramount Communication Inc. that they may create fifth and sixth commercial television networks. Elizabeth Kolbert, "Warner Bros. Enters Race for Network," New York Times, November 3, 1993 at D1.

programming. At present, 98% of American households own television sets and receive over-the-air service which is delivered for only a fraction of the cost of building a fiber network. Broadcasting is the only locally based video medium capable of instantly transmitting news of distant events as well as local emergencies free of charge. Its survival in the new television era depends on its ability to compete effectively with other players not similarly burdened with antiquated regulations.

Assistant Secretary of Commerce and Administrator of the National Telecommunications and Information Administration, Larry Irving, recently reminded Congress of the continuing value of broadcast television: "Broadcasters remain the principal source of free, universally available electronic information in the United States, and it is important to ensure full participation by that industry in the NII."^{23/}

Licensees are eager to participate in the NII by developing and transmitting a variety of services including specialized, interactive, and on-line broadcasts. However, to compete effectively with larger participants in the video marketplace, while sustaining a commitment to local programming, Licensees require immediate regulatory reform in

^{23/} Hearings Before the House Subcommittee on Economic and Commercial Law, 103d Cong., 2nd. Sess. (statement of Larry Irving, U.S. Department of Commerce) (January, 26, 1994) ["Irving Statement"].

keeping with market developments. Such reform should include, at the very least, a change of the duopoly rule to permit common ownership in functionally distinct markets and combinations with UHF stations in the same market.

IV. THE COMMISSION SHOULD RELAX THE DUOPOLY RULE BEFORE PENDING LEGISLATION IS ENACTED.

Three comprehensive telecommunications bills are pending in Congress.^{24/} All three bills provide for the liberalization of cable ownership restrictions; the Senate bill expressly instructs the Commission to review and revise the current ownership restrictions on broadcasters.^{25/} The Clinton Administration too, according to Assistant Secretary of Commerce Larry Irving, is committed to:

removing unnecessary and artificial barriers to participation by private firms in all communications markets, while making sure that consumers remain protected and interconnected. . . . To this end, the Administration supports the initiation by the

^{24/} H.R. 3626, 103d Cong., 1st Sess. (1993) ("Brooks-Dingell"); H.R. 3636, 103d Cong., 1st Sess. (1993) ("Markey-Fields"); S. 1822, 103d Cong. 2nd Sess. (1994) ("Hollings-Danforth").

^{25/} The Hollings bill provides:

Within 1 year after the date of enactment of this Act, the Commission shall, after a notice and comment proceeding, modify or remove such national and local ownership rules on radio and television broadcast stations as are necessary to ensure that broadcasters are able to compete fairly with other media providers while ensuring that the public receives information from a diversity of media sources.

federal Communications Commission (FCC) of a review of current broadcast policies.^{26/}

The alterations Licensees have supported are consistent with the bipartisan Hollings-Danforth proposal and accord with the apparent will of the Administration. With this rulemaking proceeding, the Commission wisely undertook to reform outdated regulations on its own initiative. It should now move promptly to conclude the proceeding and relax the television duopoly rule before, and regardless of whether, legislation is enacted. As an administrative, not legislative, creation, the duopoly rule is best revised by the Commission, not Congress. Moreover, the pending legislation addresses numerous issues having little or nothing to do with the duopoly rule. Controversy over those issues, the need to move on to health care legislation, and numerous other factors wholly extraneous to the duopoly rule issue could delay or thwart passage of comprehensive legislation. Delay in adopting the urgently needed changes in the duopoly rule should not be permitted when the Commission is free, indeed

^{26/} Irving Statement.

obligated,^{27/} to act without regard to any legislative action.

Respectfully submitted,

BENEDEK BROADCASTING CORPORATION

WIFR(TV), Rockford, Illinois
WBKO(TV), Bowling Green, Kentucky
KDLH(TV), Duluth, Minnesota
WTOK-TV, Meridian, Mississippi
KHQA-TV, Quincy, Illinois
WYTV, Youngstown, Ohio
WHSV-TV, Harrisonburg, Virginia
WTAP-TV, Parkersburg, West Virginia

CHRONICLE BROADCASTING COMPANY

KRON-TV, San Francisco, California
WOWT(TV), Omaha, Nebraska
KAKE-TV, Wichita, Kansas
KLBY(TV), Colby, Kansas
KUPK(TV), Garden City, Kansas

LIN BROADCASTING CORPORATION

KXAN-TV, Austin Texas
KXAM-TV, Llano, Texas
KXAS-TV, Fort Worth, Texas
WAND(TV), Decatur, Illinois
WANE-TV, Fort Wayne, Indiana
WAVY-TV, Portsmouth, Virginia
WISH-TV, Indianapolis, Indiana
WOOD-TV, Grand Rapids, Michigan

^{27/} The Commission has an obligation to reexamine rules that may have outlived their purpose. See, e.g., *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so"), cert. den., 113 S.Ct. 57 (1993). Furthermore, the Administrative Procedure Act imposes a judicially enforceable obligation on the Commission to conclude with reasonable dispatch a rulemaking proceeding it initiates. See 5 U.S.C. §§ 555(b) and 706(1); *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987).

MIDWEST TELEVISION, INC.

KFMB-TV, San Diego, California
WCIA(TV), Champaign, Illinois
WCFN(TV), Springfield, Illinois
WMBD-TV, Peoria, Illinois

PADUCAH NEWSPAPERS, INC.

WPSD-TV, Paducah, Kentucky

POST-NEWSWEEK STATIONS, INC.*

WDIV(TV), Detroit, Michigan
WFSB(TV), Hartford, Connecticut
WJXT(TV), Jacksonville, Florida
WPLG(TV), Miami, Florida

PROVIDENCE JOURNAL COMPANY and KING
BROADCASTING COMPANY

KING-TV, Seattle, Washington
KGSW-TV, Albuquerque, New Mexico
KGW-TV, Portland, Oregon
KHNL(TV), Honolulu, Hawaii
KHBC-TV, Hilo, Hawaii
KOGG(TV), Wailuku, Hawaii
KMSB-TV, Tucson, Arizona
KREM-TV, Spokane, Washington
KTVB-TV, Boise, Idaho
WHAS-TV, Louisville, Kentucky
WCNC-TV, Charlotte, North Carolina

THE SPARTAN RADIOCASTING COMPANY

WJBK(TV), Augusta, Georgia
KIMT(TV), Mason City, Iowa
WBTW(TV), Florence, South Carolina
WMBB(TV), Panama City, Florida
WSPA-TV, Spartanburg, South Carolina

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* Applications are pending to acquire KHOU-TV, Houston, Texas, and KSAT-TV, San Antonio, Texas.